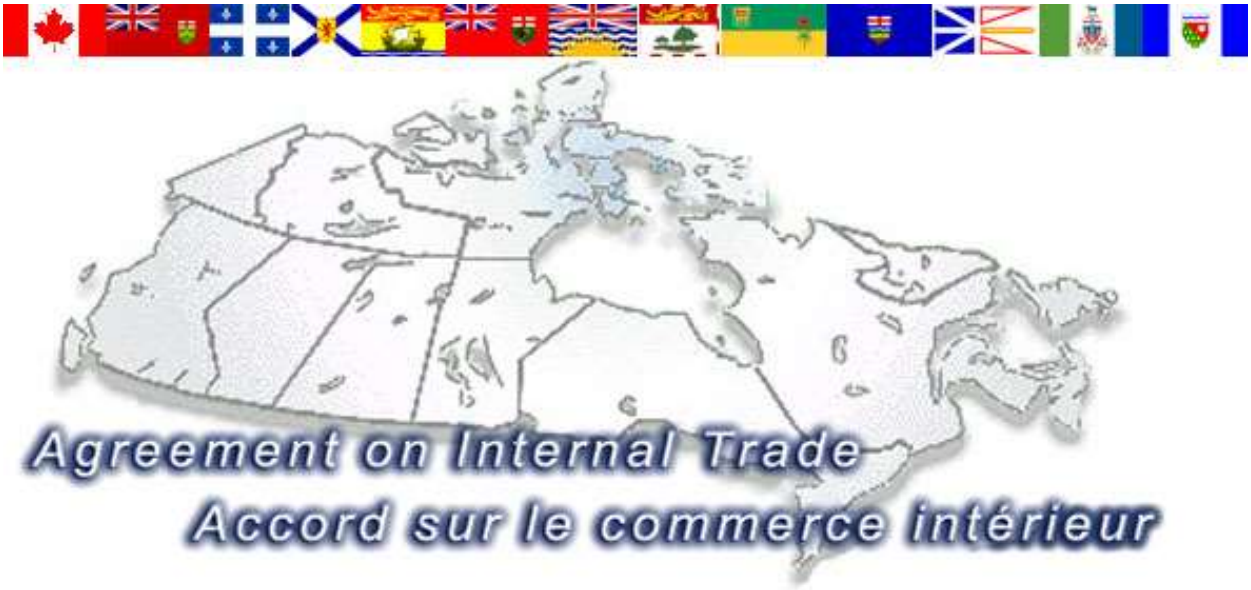

Report of Article 1706.1 Appeal Panel Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives

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I. Introduction

1. This appeal is the final stage of a dispute resolution process under the Agreement on Internal Trade (AIT). The AIT is a trade agreement that originally went into force on July 1, 1995 and has been updated since then by 13 protocols of amendment. The parties to the AIT currently are the Government of Canada and the governments of all the provinces and territories except Nunavut. According to the preamble to the AIT, the signatories have resolved, among other things, to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada".

2. Unless otherwise stated in this Report, references to "Article" or "Annex" or subdivisions thereof refer to parts of the AIT.

3. The present dispute began with a complaint by Saskatchewan that sections 4.1, 7.1 and 7.2 of the Quebec *Food Products Act* ("FPA") were inconsistent with Quebec's obligations as a signatory to the AIT.

4. The impugned legislation read as follows:

> 4.1 In addition, no person shall
>
> (1) use the words « milk », « cream », « butter », « cheese » or a derivative of any of those words to designate a dairy product substitute ;
>
> (2) use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.
>
> 7.1 No person shall mix a dairy product or constituent of a dairy product with a dairy product substitute, except to the extent provided by regulation.
>
> 7.2 No person shall prepare, offer for sale, sell, deliver, process or keep, display or transport for the purpose of sale any dairy product substitute that is not designated by regulation.

5. Section 4.1 must be read in conjunction with section 4 of the FPA, which reads as follows:

> No person shall use on a product, its container, label or package, on any sign relating thereto or in any document concerning the advertising, keeping, handling or distribution of a product for sale, any inaccurate, false or misleading indication or indication that could confuse the purchaser as to the source, nature, category, class, quality, condition, quantity, composition, preservation or safe use of the product.
>
> The absence of an indication, or an incomprehensible or illegible indication, on

any of the elements described in the first paragraph is considered to be an inaccurate, false or misleading indication.

6. In addition, the impugned legislation is governed by the following definitions in the FPA:

1 (a.3) "dairy product": milk, or any derivative of milk, and any food product made with milk as the sole ingredient or the main ingredient;

(a.4) "dairy product substitute": any food product which may be substituted for a dairy product and which, in its external characteristics or its mode of use, resembles a dairy product;

7. In recent years, dairy product substitutes have proliferated on the Canadian market and are generally sold freely in all provinces of Canada except Quebec.

8. Dairy product substitutes sold in Canada are made primarily from edible oils derived from grain produced in the western provinces. Quebec is the pre-eminent producer of dairy products in Canada.

9. Saskatchewan says that real objective of the impugned Quebec legislation is protection of the Quebec dairy industry against competition from dairy product substitutes. Quebec says that the legislation is intended to protect the consumer.

10. On January 23, 2012, Saskatchewan and British Columbia requested consultations with Quebec under Article 1702.1 of the AIT. When these consultations were held on April 4, 2012, Manitoba also participated as an interested party.

11. The parties failed to resolve the dispute in the consultations under Article 1702.1 and on June 17, 2013 Saskatchewan made a request under Article 1703(1) for the establishment of a Panel.

12. Article 1703 (9.1) permits “any Party that has a substantial interest in the matter in dispute … to join the Panel Proceeding as an Intervenor” by giving written notice of intervention in accordance with this article.

13. British Columbia, Manitoba and Alberta filed Notices to Intervene in support of Saskatchewan's complaint.

14. A Panel was duly convened under Article 1704 to examine whether the impugned provisions of the Québec *Food Products Act* were inconsistent with the AIT.

15. The Panel held a hearing in Québec City on January 8, 2014; and, on March 31, 2014, released its report finding in favour of Saskatchewan's complaint.

16. On April 25, 2014 Québec filed a Notice of Appeal under Article 1706.1 appealing the Panel Report to an Appellate Panel.

17. In accordance with Article 1704, the present panel was established as the Appellate Panel to hear Québec's appeal.[1]

18. The Appellate Panel held a hearing at Regina, Saskatchewan on October 27, 2014 and releases its findings in the present report.

19. The Panel's findings regarding section 7.1 and 7.2 of the FPA have not been appealed. Following the hearing in this matter, counsel for Quebec advised the Appellate Panel that, effective December 3, 2014, sections 7.1 and 7.2 of the FPA and related regulation-making powers under s. 40 (b.1) and (b.2) were repealed by *An Act to address the findings of the panel established under the Agreement on Internal Trade regarding Sections 7.1 and 7.2 of the Food Products Act*.

II. Appellate Jurisdiction

20. The appeal right under Article 1706.1 is a comparatively new addition to the AIT, being added by the Tenth Protocol of Amendment that came into force on October 7, 2009. This is the first time that the appeal right has been exercised.

21. Article 1706.1(1) provides that an appeal may be based "on the grounds that the panel erred in law, failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction."

22. Article 1706.1(4) sets out the Appellate Panel's mandate in the following terms:

> The Appellate Panel shall, on the completion of the hearing, issue a report with reasons which:
>
> (a) may confirm, vary, rescind, or substitute the Report of the Panel in whole or in part, or refer the matter back to the Panel for rehearing; and
>
> (b) Shall award Operational Costs in accordance with Rule 47, and may, in its discretion, award Tariff Costs in which case they shall be made in accordance with Rule 48 and 49, of Annex 1705(1).

[1] Shortly after the Appellate Panel was established, one of the original members, Mr. Guy Joubert, recused himself in light of a potential conflict of interest and was replaced by Mr. Ronald Perozzo. Reference to "the present panel" includes this change in membership.

III. Report under appeal

23. The Panel's findings are summarized at Part 7 of its Report as follows:

(a) Section 7.1 and 7.2 of the FPA are contrary to Quebec's commitments under the AIT Articles 401, 402 and 403.

(b) The issue of compliance of section 4.1 of the FPA with the AIT is properly before this Panel in this Dispute.

(c) Section 4.1(1) of the FPA is contrary to Quebec's commitments under the AIT Articles 403 and 905 of the AIT.

(d) Section 7.1 and 7.2 of the FPA do not serve a legitimate objective.

(e) While the Panel makes no ruling on the issue of whether the provisions of section 4.1(1) of the FPA serve the legitimate purpose of consumer protection, the Panel finds that even if such legitimate purpose was established, the provisions of section 4.1(1) cannot be justified under Articles 404 (c) and 905 (2) and (3).

(f) The Panel declines to make a ruling on the provisions of section 7.5 of the FPA and on sections 11.9.1, 11.9.2 and 11.9.4 of the Regulations.

(g) Sections 4.1(1), 7.1 and 7.2 of the FPA constitute an ongoing impediment to internal trade and have caused injury.

24. In Part 8 of its Report, the Panel makes the following recommendations:

(a) That Quebec repeal or amend those Measures which this Panel has determined to be non-compliant with the AIT to bring them into compliance with the AIT no later than December 31, 2014, including those measures in the Regulations which are incidental to the non-compliant Measures.

(b) That until such time as compliance is effected, the Respondent refrain from enforcing those Measures which this Panel has determined to be non-compliant with the AIT, including new prosecutions pursuant to such Measures.

(c) That there be some consideration given by the Parties to the AIT to the remarks of the Panel made in part 5.2 of this Report in terms of a review of Chapter Seventeen and the relevant Annexes thereto to provide for additional procedural elements allowing the Parties to narrow those issues which remain in dispute after the consultations process with more clarity and specificity, all of which would benefit the Parties to a Dispute as well as the Panel seized of such Dispute.

IV. Grounds of Appeal

25. Although the Notice of Appeal initially cast a somewhat wider net, the grounds of appeal that were actively pursued in the Appellant's written and oral submissions to the Appeal Panel were the following:

    a. The Panel erred in law in its interpretation of the scope and coverage of Chapter Nine of the AIT.

    b. The Panel erred in law by adopting a broad interpretation of Article 402 of the AIT.

    c. The Panel erred in law in its interpretation and application of international standards and by failing to adequately consider the rules of the World Trade Organization's Agreement on Technical Barriers to Trade. This is further particularized as errors regarding:

        i. Interpretation of Article 405(1)

        ii. Interpretation of paragraph 1 Annex 405.1

        iii. Interpretation of paragraph 4 of Annex 405.1 and of Article 905(1)

        iv. Application of the Agreement on Technical Barriers to Trade

        v. Relevance of international standard.

    d. The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Articles 403 and 905 of the AIT.

    e. The Panel erred in law in its application of Article 404 of the AIT.

    f. The Panel erred in law in the application of Article 905 of the AIT and in particular in the asserting that these paragraphs apply supplementary disciplines on the use of the legitimate objectives exception set out in Article 404 of the AIT.

    g. The Panel acted beyond its jurisdiction by recommending that Québec refrain from enforcing its measures.

    h. Alternatively, if the Appellate Panel were to determine that section 4.1(1) of the FPA is inconsistent with Article 403 of the AIT, it should rule that this measure is still permissible under Article 404 of the AIT.

V. Standard of Review

Introduction

26. Before addressing the individual grounds of appeal, the Appellate Panel must determine the standard of review that applies to its review of the Panel decision. This is a matter of first instance; since as noted previously, this is the first Appellate Panel review under the AIT.

27. Canadian administrative law recognizes two standards of review when an appellate body or a court exercising judicial review functions reviews the decision of a first instance decision-maker.

28. One is the standard of "correctness", which means that the reviewing body must decide whether or not the decision of the first instance decision-maker was correct. If the reviewing body disagrees with the decision-maker, the reviewing body may substitute its decision for that of the decision-maker.

29. A standard of "reasonableness", on the other hand, means that the reviewing body must decide whether the decision of the first instance decision-maker was "reasonable", in the sense that it falls within the range of acceptable outcomes. The reviewing body is said to owe "deference" to the decision-maker and may not substitute its views for those of the decision-maker unless the decision under review falls outside of the range of acceptable outcomes.[2]

30. The standards of review were developed by the courts and are most commonly applied when a Court of Appeal reviews the decision of a lower court; or, when a court (usually a court of first instance) judicially reviews the decision of an administrative decision-maker. As we will see, a careful examination of the rationale for the standards of review is necessary in order to determine how they apply to an appellate review under the AIT. First however, it is necessary to examine how standards of review are applied in the courts.

Standard of review in the Court of Appeal

31. The leading authority on the standard of review to be applied when a Court of Appeal is hearing an appeal from a lower court is *Housen v Nikolaisen,* [2002] 2 S.C.R. 235; 2002 SCC 33. In that case, the Supreme Court of Canada instructs Courts of Appeal on the standard of review that they are to apply to: questions of law, questions of fact, inferences of fact, and questions of mixed fact and law. It also addresses the reasons for these standards.

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[2] See, *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190; 2008 SCC 9.

32. The applicable principles are stated as follows:

> Questions of Law
>
> On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness…
>
> There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. … A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts … Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.[3]
>
> Questions of Fact
>
> The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error"…[4]
>
> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.[5]
>
> Inferences of Fact
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. [6]

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[3] *Housen* at para. 8-9
[4] *Housen* at para. 10
[5] *Housen* at para. 12, quoting Laskin JA in *Gottardo Properties* at para. 48
[6] *Housen* at para. 23

> Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. [7]
>
> Questions of Mixed Fact and Law
>
> At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts … On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. … [8]
>
> [A] question of mixed fact and law …is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.[9]

Standard of Review in Judicial Review

33. The leading authority on the standard of review to be applied when a court judicially reviews the decision of an administrative decision-maker is *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190; 2008 SCC 9.

34. *Dunsmuir* sets out the following principles regarding selection of the standard of review on a judicial review application:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.[10]
>
> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In

[7] *Housen* at para. 25
[8] *Housen* at para. 26
[9] *Housen* at para. 37
[10] *Dunsmuir* at para. 62

> many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.[11]

35. The importance of a privative clause is explained in the following terms:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. [12]

36. Where a question of law involves a decision-maker's "home statute" or an area where it has specialized expertise, the court will generally give deference to the decision-maker's interpretation of the law.[13]

37. On the other hand, where the question of law is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", the court will apply a standard of correctness.[14]

38. The court will also apply a standard of correctness to "true questions of jurisdiction or *vires"*, i.e. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". The court must view the tribunal's jurisdiction in a "robust" manner and "reviewing judges must not brand as jurisdictional issues that are doubtfully so."[15]

Standard of Review by Appellate Administrative Tribunal

Jurisprudence

39. We have been referred to a number authorities that address the standard of review to be applied by an appellate administrative tribunal: *Newton v. Criminal Trial Lawyers Association*, 2010 ABCA 399; *Parizeau v Barreau du Québec*, 2011 QCCA 1498; *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331; *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 79; *Alverez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 702; *Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913.

40. The *Newton* case involved a finding of police misconduct by a presiding officer hearing a disciplinary complaint under the *Police Act;* and, a subsequent review of the presiding officer's decision by the Law Enforcement Review Board, which conducted a *de novo* hearing.

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[11] *Dunsmuir* at para. 64
[12] *Dunsmuir* at para. 52
[13] *Dunsmuir* at para. 54; See also, *Information and Privacy Commissioner v Alberta*, [2011] 3 S.C.R. 654
[14] *Dunsmuir* at para. 60
[15] *Dunsmui*r at para. 59

41. The Alberta Court of Appeal allowed a statutory appeal from the decision of the Law Enforcement Review Board on the grounds that the Board had applied the wrong standard of review.

42. The Court comments as follows[16]:

> The determination of the standard of review to be applied by an appellate administrative tribunal (here the Board) to the decision of an administrative tribunal of first instance (here the presiding officer) requires a consideration of many of the same factors that are discussed in ***Housen*** and ***Dunsmuir***/***Pushpanathan***, adapted to the particular context …
>
> The following factors should generally be examined:
>
> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
>
> (b) the nature of the question in issue;
>
> (c) the interpretation of the statute as a whole;
>
> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
>
> (e) the need to limit the number, length and cost of appeals;
>
> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
>
> (g) other factors that are relevant in the particular context.

43. The Court also noted that: "the mere presence of a right of appeal does not warrant a correctness standard of review"[17].

44. The *Parizeau* case began when a lawyer, Ms. Parizeau, was struck off the roll of the Québec Order of Advocates for various ethical infractions in her handling of a divorce case.

45. After the prescribed period of disqualification expired, she applied to the "Motions Committee" of the Quebec bar to be reinstated but was refused. She appealed this refusal to the Professions Tribunal, which quashed the decision of the Motions Committee and ordered her reinstatement. The Québec bar then sought judicial review of the Professions Tribunal decision in the Superior Court; and, the Superior Court quashed the Professions Tribunal decision. On appeal to the Québec Court of Appeal, the court allowed the appeal and restored the decision of the Professions Tribunal.

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[16] *Newton* at para. 42-43
[17] *Newton* at para. 52

46. The Quebec Court of Appeal identifies the different considerations that apply to judicial review and an administrative appeal in the following terms:

> (TRANSLATION)
>
> That said, if these teachings apply when Parliament provides that the right of appeal from decisions of a specialized administrative tribunal is to be exercised before a general court of justice – and that is what is at issue in all these Supreme Court decisions – then do these teachings also apply when appeal lies before *another administrative body, which is also specialized*? In the first case, the dynamic specific to administrative law is expressed fully and the distinction between a specialized administrative body, to which Parliament has entrusted the expert mission of developing standards in a particular area, and a general court of justice, the guardian of the rule of law, as underlined above (see *supra,* para. 69), commands that the matter be treated according to the rules of judicial review. However, can this dynamic and the resulting imperative apply in the second case, when the appellate body is also part of the administrative branch of law? The reasons that justify the deference of courts of justice toward specialized administrative bodies, which reasons derive from the organization and respective roles of the executive and judicial branches of government as well as from respect for the intent of the law, are hardly persuasive when the appellate body itself belongs to the administrative branch of law and is vested with a specialized mandate as well.[18]

47. The Quebec Court of Appeal notes that the Professions Tribunal is given a broad appellate power to confirm modify or quash any decisions submitted to it and to render any decision that in its judgment ought to have been rendered at first instance. Given this broad authority, the Court of Appeal says that the tribunal has a true appellate jurisdiction and it is inappropriate to impose a level of deference that would convert this function into a "pseudo-judicial review".[19]

48. The court concludes that the correct standard of review for appellate administrative bodies is the *Housen* standard as applied by courts of appeal, but broadly qualifies this statement by adding: (TRANSLATION) “with all the reservations and adaptations that are required by the particular statute in each case as well as by the general rules of administrative law.” [20]

49. In concluding that the Professions Tribunal has a broad power to correct errors of law by the Motions Committee, the Court of Appeal recognizes that the Tribunal (TRANSLATION) “…was created by Parliament in order to oversee the whole Québec professional regulation system and to assure the development of general standards, including in disciplinary matters and in matters of access or re-access to different professions.”[21]

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[18] *Parizeau* at para. 75
[19] *Parizeau* at para.78
[20] *Parizeau* at para 81
[21] *Parizeau* at para 86

50. The *BCSPCA* case involves the scope of the appellate authority of the Farm Industry Review Board (FIRB) to hear appeals from the decision of an SPCA agent to take an animal into custody. Under the relevant legislation, the SPCA itself was given authority to review the agent's decision; but if that authority was not exercised within 28 days of the request for review, the FIRB could hear the appeal directly from the agent's decision. The FIRB also had jurisdiction if the SPCA reviewed the agent's decision and upheld it.[22]

51. Before the FIRB, the SPCA argued that the FIRB jurisdiction was a "true appeal" and not a *de novo* hearing and that the standard of review was reasonableness.

52. The FIRB quite reasonably concluded that if it had the authority to entertain an appeal when there was no review by the SPCA, then its appellate jurisdiction could not be limited to reviewing the reasonableness of SPCA reviews. The FIRB concluded that it had the authority to apply a correctness standard "not limited to the record before the Society, but taking into account all relevant factors including any material changes that occurred during the appeal period."[23]

53. On judicial review to the British Columbia Supreme Court, the court upheld the FIRB decision. It refused to follow *Newton* because "it turns on the interpretation of a very different statute" and "it appears never to have been followed outside of Alberta"; and, more significantly, because "I also consider, with respect, that the Alberta Court of Appeal's reasoning on the standard of review of tribunals decisions is inconsistent with subsequent pronouncements of the Supreme Court of Canada, discussed below."[24]

54. While several Supreme Court of Canada decisions are indeed "discussed below" in *BCSPCA*, the Court does not explain how *Newton* is supposed to be inconsistent with these decisions.

55. *Huruglica, Alverez* and *Spasoja* all involve the same issue. In each case, the Refugee Appeal Division ("RAD") created under the *Immigration and Refugee Protection Act* ("IRPA") analyzed its role in reviewing decisions of the Refugee Protection Division ("RPD"). The RAD applied the *Newton* analysis and concluded that the correct standard for its review of RPD decisions was reasonableness. In each case, this conclusion was overturned by the Federal Court on judicial review. *Alverez* and *Spasoja* also cite the *Parizeau* case with approval.

56. All three decisions focus on the nature of the appeal right conferred by the IRPA and conclude that a reasonableness standard is incompatible with that right. In particular section 110(1) of IRPA permits an appeal on "a question of law, of fact or of mixed law and fact to the Refugee Appeal Division against the decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection"; and, 110(3)-(6) contains detailed provisions about when the RAD appeal is to be on the record before the RPD and when new evidence may be heard.

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[22] *BCSPCA* at para. 8
[23] *BCSPCA* at para. 25
[24] *BCSPCA* at para. 31

57. All of the preceding jurisprudence involved appellate administrative bodies that were created by legislation. The AIT however is not a statute but an agreement and its dispute resolution procedures resemble in some respects a codified negotiation and arbitration process. For that reason, the parties also refer to *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53.

58. The *Sattva* case involved a contract to pay a finder's fee in shares of the Creston company. The parties disagreed on the interpretation of their contract with respect to the date that should be used to price the shares and whether a "maximum amount" proviso limited the fee to US$1.5 million on the date the fee was payable. An arbitrator found in favour of Sattva.

59. Creston applied to the British Columbia Supreme Court under section 31(2) of the *Arbitration Act* for leave to appeal the arbitral award. Such appeals were only available on "any question of law" that met the statutory criteria.

60. The British Columbia Supreme Court refused leave on the ground that the matter in dispute did not raise a question of law. The Court of Appeal reversed the decision and granted the application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law.

61. The British Columbia Supreme Court then heard the appeal and dismissed it on the ground that the arbitrator's decision was correct. The Court of Appeal allowed an appeal from the British Columbia Supreme Court decision. Finally, Sattva appealed the decision to grant leave to appeal and the decision on the merits of the appeal to the Supreme Court of Canada. The Supreme Court of Canada allowed the appeal and restored the arbitrator's award.

62. The Supreme Court of Canada found that the issue in dispute was not a "question of law" and therefore leave to appeal the arbitral award should not have been granted.

63. The Court recognized that: "[h]istorically, determining the legal rights and obligations of the parties under a written contract was considered a question of law"[25]. It decided however that: "that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."[26]

64. The Court goes on to say that:

> [51] The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in

[25] *Sattva* at para. 43
[26] *Sattva* at para. 50

> ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal …
>
> [52] Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.
>
> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law … Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" … Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.
>
> [54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation.

Positions of the Parties

65. The parties and the interveners in the present case have each identified aspects of the AIT that they say militate in favour of the standard of review for which they contend.

66. The Appellant says that the standard of correctness ought to be applied because:

a. The appeal process under the AIT is the "final stage in the arbitration process" and not a judicial review. It notes that, under Article 1707.4, the Report of a Panel is final and not subject to judicial review "unless appealed pursuant to Article 1706.1(1)"; whereas the report of an Appellate Panel is simply "final and not subject to judicial review".

b. Reference is made to Annex 1704(2) regarding the composition of Panels and Appellate Panels. Panel members shall "have expertise or experience in matters covered by this Agreement" and "at least one member of each Party's roster shall have expertise in Canadian administrative law or the resolution of disputes arising under Canadian administrative law."[27] Appellate Panel members, on the other hand, are all required to

[27] Annex 1704(2), para. 3(a) and 4.1

have “expertise in Canadian administrative law or the resolution of disputes arising under Canadian administrative law” but there is no requirement that they have “expertise or experience in matters covered by this Agreement”. The Appellant says that the Panel and Appellate Panel are nevertheless similar in composition and method of operation and the Appellate Panel has all of the expertise required to decide a question of law raised by the implementation of the AIT.

c. Applying a standard of reasonableness to article 1706.1 would sterilize the appellate arbitration mechanism and disturb the overall balance of the AIT. The Appellant notes that the appeal mechanism was introduced at the same time as the parties agreed to subject themselves to enforceable monetary penalties.

d. Article 1706.1, paragraph 4(a) is said to show the intention of the parties to create an unrestricted right of appeal. This paragraph gives the Appeal Panel authority to "confirm, vary, rescind, or substitute the Report of the Panel in whole or in part, or refer the matter back to the panel for re-hearing".

67. The respondent and the interveners say that the standard of reasonableness ought to be applied because:

a. The different types of expertise required of Panels and Appellate Panels by Annex 1704(2) mean that the Appellate Panel should show deference to the findings of the Panel.

b. An Appellate Panel under the AIT is an ad hoc body for resolution of a particular dispute and it is *not* expected to provide a supervisory role in ensuring overall consistency in the development of the law of internal trade, unlike for example, the WTO Appellate Body. Appellate Panel decisions are not binding on Panels other than the Panel under review.

c. Reference is made to Article 101(4)(d) in which the parties to the AIT recognized the need for dispute settlement mechanisms that are “accessible, timely, credible and effective” and Article 1705(3) that requires proceedings before presiding body to be dealt with "as informally and expeditiously as the circumstances and considerations of fairness permit." These provisions are said to favor limited appeal rights.

d. Annex 1705(1), par. 35 allows interveners to participate fully in hearings before the Panel, while paragraph 44.3 provides that in the appeal process interveners are only permitted to provide a written response to the appellant's submission. It is suggested that, in consequence, fairness to interveners requires that only a limited right of appeal be given.

VI. Analysis of Standard of Review

General Principles

68. The jurisprudence regarding appellate administrative bodies is relatively consistent in applying the first three of the *Newton* criteria, i.e. they consider: the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation; the nature of the question in issue; and, the interpretation of the statute as a whole. In our view this is a good starting point.

69. *Parizeau* and the cases following it, make the point that when the legislature creates an administrative appellate body to review the decision of another administrative body, it must have intended to create a standard of review that is different than the standard of review that the courts would normally apply in an application for judicial review. Otherwise, it would have simply left the administrative tribunal to be judicially reviewed by the courts.[28]

70. With respect, we do not consider that to be a strong point. One could just as well say that if the legislature had intended a standard of review similar to that applied by the Court of Appeal it would have created a right of appeal to the Court of Appeal.

71. Moreover, an appellate administrative body can be created for reasons other than selecting the standard of review.

72. *Parizeau* makes a more fundamental point however, when it says that the courts generally adopt a position of deference to administrative tribunals on judicial review in recognition of the different roles of the courts and the tribunals. The administrative tribunal is vested by the legislature with the authority and responsibility to decide specialized matters within its jurisdiction. The court is a generalist body with the authority and responsibility to protect the rule of law and to ensure that administrative tribunals: act within their jurisdiction, follow the rules of natural justice and do not make errors of law that affect matters beyond their specialized remit. An appellate administrative tribunal does not have the responsibilities of a court but rather has an oversight function within the same administrative structure in which the original administrative tribunal is operating. As such, it does not have the same reasons for deference as a court.[29]

[28] *Parizeau* at para. 78; *Huruglica* at para. 41; *Alverez* at para. 25;
[29] See, *Parizeau* at para. 75

73. In our view this is correct as far as it goes, but it does not mean that an appellate administrative tribunal can never review a first instance tribunal on a standard of reasonableness. It just means that if reasonableness *is* the appropriate standard, the reason for that standard must be found in the legislation (or in our case Agreement) creating the two tribunals or other relevant factors; not in jurisprudence governing the relationship between the courts and administrative tribunals in a judicial review context. Likewise, the creation of a right of appeal does not automatically mean that the appellate body applies the same standard of review as a Court of Appeal.[30]

Conclusions on Standard of Review

74. In our view, the starting point must be to examine the nature of the appellate review jurisdiction conferred upon us by the AIT and to consider how that jurisdiction is to be applied to the grounds of appeal that have been advanced by the Appellant.

75. Most of the grounds of appeal allege errors of law in the interpretation of the AIT. Several grounds allege that the Panel failed to give adequate reasons in support of its decision. This alleged insufficiency of reasons engages one of the principles of natural justice. The Appellant alleges that the Panel exceeded its jurisdiction when it recommended that Québec not enforce its measures that the Panel found to be inconsistent with the AIT. The Appeal Panel must consider whether the question regarding authority to recommend non-enforcement is a true question of jurisdiction or an allegation of error of law that ought to be considered on the same standard of review as the other errors of law alleged by the Appellant.

76. Accordingly, the Appeal Panel will consider the standard of review to be applied to: (1) adequacy of reasons; (2) authority to make recommendations for non-enforcement; and (3) other alleged errors in the interpretation of the AIT.

77. In our view, the standard of review to be applied to adequacy of reasons is one of correctness. It can be assumed that the Panel considered its reasons to be adequate or it would have written them differently. We do not consider however that we are obliged to defer to the Panel's assessment of its own reasons.

78. We are given authority to review a Panel decision for failure to respect rules of natural justice. This is a matter of Canadian Administrative Law in which the Appeal Panel has greater expertise than the Panel.

79. In determining whether the Panel had the authority to make recommendations for non-enforcement, we consider that the Appeal Panel should bear in mind the cautions by the Supreme Court of Canada in *Dunsmuir* to interpret true questions of jurisdiction narrowly and not to "brand as jurisdictional issues that are doubtfully so".

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[30] See, *BSCPCA* at para. 32

80. In our view, whether the Panel had the authority to make the impugned recommendations involves a question of interpretation of the scope of Article 1706(3)(d) of the AIT (discussed further below) and the Panel's determination ought to be reviewed on the same standard as its determination of other issues regarding interpretation of the AIT.

81. Article 1706.1(1) gives us the jurisdiction to entertain appeals based "on the grounds that the panel erred in law, failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction."

82. It will be observed that this article does not give the Appeal Panel any authority to review findings of fact by the Panel.

83. The *Sattva* case thus gives rise to a preliminary consideration. One could construct the following syllogism: *Sattva* holds that interpretation of a contract is a mixed question of fact and law. The AIT is a contract, therefore interpretation of the AIT is a mixed question of fact and law. The Appeal Panel's jurisdiction (outside of matters of natural justice and jurisdiction) is limited to questions of law; therefore the Appeal Panel has no jurisdiction to hear an appeal involving interpretation of the AIT.

84. We do not however consider this to be a correct interpretation.

85. *Sattva* concerned the scope of a limited statutory appeal right to a court against the decision of an arbitrator.

86. In the present case, the parties to the AIT have agreed that the Panel's decision is final "unless appealed pursuant to Article 1706.1(1)".[31] It is not a matter of the legislature imposing an appeal procedure on the parties to an arbitration but rather a form of protection against errors of law that the parties have expressly given themselves.

87. When a court is given jurisdiction to hear an appeal based on error of law, the type of legal error that may be advanced to the Appeal Court is virtually limitless.

88. In the case of an Appeal Panel under the AIT however, it can reasonably be assumed that the Parties to the AIT expected that the vast majority of legal errors that would form the basis for an appeal under Article 1706.1(1) would be alleged errors in the interpretation of the AIT.

89. Furthermore, before *Sattva* and at the time of the Tenth Protocol that introduced the appeal right, interpretation of the Agreement would normally have been considered an issue of law.

90. In our view, the parties intended the Appeal Panel's jurisdiction to review a Panel for errors of law to include the right to review it for errors in interpretation of the AIT.

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[31] Article 1701.4

91. This brings us to the fundamental question to be resolved with respect to standard of review. When an Appellant alleges that a Panel erred in interpretation of the AIT, does the Appellate Panel review the Panel on a standard of correctness or a standard of reasonableness?

92. In our view, the appropriate standard is reasonableness.

93. As we have explained above, many of the considerations that induce a court to exercise deference towards an administrative tribunal on judicial review do not apply in the relationship between the Appellate Panel and a Panel under the AIT. Likewise, many of the considerations that govern an appeal court's oversight of lower courts do not apply in the relationship between the Appellate Panel and a Panel under the AIT.

94. One consideration however that does apply in both the judicial review context and in the present context is the relative expertise of the generalized reviewing body as compared to the specialized decision maker. Unlike the Panel, we do not have "expertise or experience in matters covered by this Agreement". Such experience provides a basis for a practical interpretation of the Agreement in a manner that best achieves its objectives.

95. We do not accept that appellate review on a reasonableness standard sterilizes the appeal process. The courts routinely exercise such restraint in entertaining statutory appeals from specialized tribunals on matters of interpretation of their own statute.

96. Furthermore, the fact that Article 1707.4 exempts both the Panel and the Appellate Panel's decisions from judicial review, means that adoption of a reasonableness standard by the Appellate Panel does not duplicate the review to be conducted by a court on judicial review.

VII. Analysis of Grounds of Appeal

The Panel erred in law in its interpretation of the scope and coverage of Chapter Nine of the AIT

97. Under Part 5.2 of its Report, in the first paragraph, the Panel states the following:

> The full inclusion of food and agricultural measures into the AIT was effected by the Eleventh Protocol of Amendment on November 8, 2010 and the introduction of the new Chapter Nine to the AIT. It warrants noting that there is no dispute as to whether dairy alternatives are subject to the AIT and they have been identified as a measure within the jurisdiction of the AIT and in particular, Chapter Nine thereof.

98. Part 5.2 then goes on to consider Quebec's argument that the Panel does not have any jurisdiction to make any ruling or finding regarding section 4.1 of the FPA because the issue of section 4.1 was not raised in the request for consultations or the request to establish the Panel. The Panel rejected that argument and ruled that it had jurisdiction. This jurisdictional ruling has not

been appealed to this Appellate Panel.

99. The Appellant points out that Article 902(1) regarding the scope and coverage of Chapter 9 states that: “this chapter applies to technical measures adopted or maintained by a Party relating to internal trade in agricultural and food goods”(emphasis added).

100. The Appellant says that the Panel erred in law by referring to the "full inclusion of food and agricultural measures into the AIT" when in fact Chapter 9 only includes "technical measures" relating to agricultural and food goods.

101. The Respondent refers to this point as “a pedantic point without any consequence” and suggests that the Panel was simply contrasting the prior scope of Chapter 9, which included only certain technical measures within its scope; and the current Chapter 9, where all technical measures are included.

102. It is worth noting that the definitions contained in Article 907 say that a “technical measure” means, inter alia, a “technical regulation”; and, “technical regulation” includes “labelling requirements as they apply to a product, process or production method”.

103. Also, as appears in Part 5.4.3 of the Panel report, Quebec’s submission to the Panel included an argument that Article 404 must be read in light of Article 905, which relates to the right of the Parties to establish technical measures. This argument would be without meaning unless Québec accepted that section 4.1 of the FPA was a “technical measure”.

104. In our view, there is no doubt that Chapter 9 is limited to technical measures; however it is equally clear that the labeling provisions contained in section 4.1 of the FPA were accepted by all parties as being “technical measures” covered by Chapter 9 of the AIT.

105. While the opening paragraph of part 5.2 of the Panel’s reasons could have been more felicitously expressed, it is not clear that the Panel was really under a misapprehension that Chapter 9 applied to non-technical measures in relation to food and agricultural products. Even if it were, this case concerned a challenge to a technical measure so any such misapprehension would not affect the outcome of this appeal.

The Panel erred in law by adopting a broad interpretation of Article 402 of the AIT

106. The Panel found that Articles 4.1(1), 7.1 and 7.2 of the FPA were contrary to Quebec’s commitments under the AIT and constitute an ongoing impediment to internal trade and have caused injury.

107. Article 4.1(1) of the FPA was found to have violated Article 403 of the AIT; and, Articles 7.1 and 7.2 of the FPA were found to have violated Articles 401, 402 and 403 of the AIT.

108. The Appellant has appealed the findings regarding Article 4.1(1) of the FPA but has not appealed the findings regarding sections 7.1 and 7.2 of the FPA.

109. Since the Panel's findings regarding the scope of section 402 of the AIT only affect its determinations regarding sections 7.1 and 7.2 of the FPA, which are not under appeal, we consider this ground of appeal to be moot.

The Panel erred in law in its interpretation and application of international standards

110. This issue, which is the subject of several grounds of appeal, is most easily approached by starting with the multifaceted argument that the Appellant unsuccessfully advanced to the Panel; and, which it now urges upon the Appellate Panel. The Appellant essentially appeals each of the elements of this argument that the Panel rejected or is alleged to have failed to consider.

111. The Appellant says that Article 403 (prohibiting the creation of obstacles to internal trade) and Article 905 (regarding technical measures) must be read in conjunction with Articles 405 and Annex 405.1 (regarding harmonization of standards); and, in particular with paragraph 17 of Annex 405.1, which states that: "each party shall, where appropriate and to the extent practicable, base its standards on relevant national standards, de facto national standards or international standards."

112. The Appellant says that this means that where an alleged barrier to internal trade is a measure, including a technical measure, that is consistent with an international standard, that measure is presumed to be compliant with the AIT.

113. This conclusion is said to follow from analogous provisions of the North American Free Trade Agreement and World Trade Organization (WTO) Agreement that were negotiated at the same time as the AIT and to which Canada is a party. Reference is made in particular to Article 2.5 of the WTO Agreement on Technical Barriers to Trade, which states that a measure consistent with an international standard will be presumed not to create an obstacle to international trade.

114. The Appellant argues that the Québec's labeling measure contained in Article 4.1(1) of the FPA is consistent with an international standard contained in the Codex Alimentarius ("Codex") standard, developed by the World Health Organization ("WHO") and the Food and Agriculture Organization ("FAO"). The WHO and FAO are United Nations organizations that adopted the Codex in 1963. Within the Codex, is the Codex General Standards on the Use of Dairy Terms ("CGSUDT"), which the Appellant says is relevant in the present case.

115. The Appellant says that the definitions of "milk and milk products" in the Québec legislation and the Codex are consistent. Essentially both exclude dairy product substitutes and mixtures of dairy products and dairy product substitutes from the definition of "milk and milk products."

116. Against this background the Appellant argues that section 4.1 (1) of the FPA is consistent with section 3 of the CGSUDT, which states that:

> Food shall be described or presented in such a manner as to ensure the correct use of dairy terms intended for milk and milk products, to protect consumers from being confused or misled and to ensure fair practices in the food trade.

117. This argument was given short shrift by the Panel in part 5.4.1 of its Report.

118. The Panel began by quoting section 2.3 and 4.5 of the CGSUDT:

> 2.3 Composite milk product is a product of which the milk, milk products or milk constituents are an essential part in term of quantity in the final product, as consumed provided that the constituents not derived from milk are not intended to take the place in part or in whole of any milk constituents.
>
> 4.5 A product complying with the description in section 2.3 may be named with the term "milk" or the name specified for the milk product as appropriate, provided that a clear description of the other characterizing ingredient(s) (such as flavoring foods, spices, herbs and flavors) is given in close proximity to the name.

119. The Panel found that section 4.1(1) of the FPA was "prohibitive to a degree far beyond what is contemplated in section 4.5 of the CGSUDT."

120. The Panel went on to say that:

> "The Panel does not find it necessary or useful to engage in a long discourse as to whether the provisions of section 4.1 of the FPA are, as a whole, "consistent with" the CGSUDT as consistency with a "standard", international or otherwise, within the meaning of paragraph 17 of Annex 405.1 cannot, per se, deem a provision to be permissible or compliant with the obligations set out in the AIT."

121. The Panel concludes by saying that:

> "Compliance or consistency with a national or international standard may be used as an evidentiary basis to establish consistency with the provisions of the AIT but does not automatically equate to such consistency."

122. In our view, the issues raised by these grounds of appeal, relating as they do to the relationship between WTO jurisprudence and the AIT and between provisions of the AIT relating to harmonization of standards and those relating to prohibition on trade barriers, are precisely the

type of technical trade issues which an Appellate Panel with expertise in Canadian administrative law ought to approach with deference.

123. For the most part, the grounds of appeal on this issue simply ask us to reevaluate the merits of the arguments that were made to the original Panel and substitute an opinion favorable to the Appellant. For the reasons previously stated with respect to standard of review, we do not consider that to be our role.

124. One of the “international standards” grounds of appeal does however raise an original point concerning alleged error of law in the Panel's reasoning.

125. The Appellant says that the Panel was wrong to compare section 4.1(1) of the FPA with section 4.5 of the CGSUDT “a section that has not been referred to by either Saskatchewan or Québec".

126. It says that section 2.3 of the CGSUDT shows that section 4.5 concerns a “true milk product” whereas section 4.1(1) of the FPA concerns labelling of milk product substitutes. Therefore the comparison of the two is mixing apples and oranges.

127. While the Appellant is correct that section 4.5 of the CGSUDT read together with 2.3 of the CGSUDT sets out a standard for labelling a “true milk product” we do not see any error in law by the Panel in referring to this section. If only pure milk and flavored milk can be labelled as “milk” under the CGSUDT then a milk product substitute, which is neither, could not be so labelled under the CGSUDT.

128. This is consistent with section 3 of the CGSUDT cited by the Appellant, which requires the correct use of dairy terms intended for milk and milk products, to protect consumers from being confused or misled and to ensure fair practices in the food trade.

129. Section 3 of the CGSUDT finds its analogue in section 4 of the FPA, which prohibits false or misleading labelling of food products.

130. Section 4.1(1) of the FPA however goes further and prohibits use of the words “milk”, “cream”, “butter”, “cheese” or a derivative of any of those words to designate a dairy product substitute, whether or not there is risk of misleading the consumer.

131. For example, the margarine sold under the name “I Can’t Believe It’s Not Butter” would contravene section 4.1(1) of the FPA because its label uses the word “butter” in labeling a dairy product substitute, even though the name of the product on the label explicitly says that it is not butter.

132. In our view, the Panel's treatment of the international standards arguments was reasonable and accordingly we find no reviewable error in this aspect of the Panel's Report.

The Panel erred in law in its interpretation and application of Articles 403, 404 and 905 of the AIT

133. The relevant articles read as follows:

> 403. **No Obstacles**
>
> Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.
>
> 404. **Legitimate Objectives**
>
> Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:
>
> (a) The purpose of the measure is to achieve a legitimate objective;
> (b) The measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;
> (c) The measure is not more trade restrictive than necessary to achieve that legitimate objective; and
> (d) The measure does not create a disguised restriction on trade.
>
> 905. **Right to Establish Technical Measures**
>
> 1. For greater certainty, in adopting or maintaining any technical measure a party may establish the level of protection it considers appropriate in the circumstances to achieve a legitimate objective.
>
> 2. For greater certainty, each party shall, in establishing that any technical measure that it adopts or maintains is not more trade restrictive than necessary to achieve a legitimate objective, take into account the risk that non-fulfillment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the technical measures and those risks.
>
> 3. Each Party shall ensure that any technical measure adopted or maintained for a legitimate objective does not arbitrarily or unjustifiably discriminate between or among Parties, including between that Party and other Parties, where identical or similar conditions prevail.
>
> 4. No Party shall adopt or apply a technical measure in a manner that would constitute a disguised restriction on internal trade.
>
> 5. Each party shall, where appropriate and to the extent practicable, specify its

technical measures in terms of results, performance or competence.

6. Each Party shall ensure that its technical measures have a scientific, factual or other reasonable basis and that where appropriate, such technical measures are based on assessment of risk.

134. In addition to the "international standards" argument dealt with above, the Appellant raises the following objections to the Panel's treatment of these provisions:

a. The Panel's reasons do not indicate how it analysed article 403 and in particular how it took into account the arguments submitted by Quebec at page 18 of its main submission;

b. Article 403 should not be interpreted as banning all barriers to internal trade since that is inconsistent with the context provided by Articles 401 and 402 as interpreted by the dissenting member on the Panel. In particular, article 403 should be interpreted in the context that its purpose is "to preserve competitive opportunities";

c. The Panel's reasons do not indicate how it analysed article 905;

d. The Panel incorrectly applied the burden of proof rule found in Annex 1813, paragraph 10, in concluding that section 4.1 of the FPA is contrary to Quebec's commitments under Article 905;

e. The Panel erred at pages 25 and 26 of its Report in finding that section 4.1 of the FPA contravened Article 404 (c) and 905(2) and (3) without first determining if a legitimate objective was established and then evaluating the measure or technical measure against that specific legitimate objective;

f. The Panel erred at page 23 of its Report when it found that paragraph 905(2), (3) and (4) of the AIT apply supplementary disciplines on the use of the legitimate objectives exception set out in article 404 of the AIT.

Article 403

135. In Part 2.3 of its submission to the Panel,[32] Quebec argued that article 403 must be read in light of its purpose which is to preserve competitive opportunities and that finding Article 4.1 of the FPA to be inconsistent with Article 403 of the AIT would be tantamount to recognizing a right to mislead the buyer of a product.

136. In Part 5.4.2 of its Report, the Panel finds that section 4.1 of the FPA creates an obstacle to

[32] Pages 17-18

internal trade because it "creates a barrier to the Parties' ability to sell milk, cream, butter or cheese alternatives by reason of their inability to use the proper words in conjunction with other words, to describe their product."

137. The dissenting panel member, Mr. Jacob, indicated that he is in agreement with "all aspects of the findings and reasons … except with respect to the interpretation given to Article 402 of the AIT." In other words, Mr. Jacob agreed with the other Panel members in the determination that section 4.1 of the FPA creates an obstacle to internal trade contrary to Article 403 of the AIT, notwithstanding his disagreement regarding the scope of Article 402.

138. That this labelling restriction creates an "obstacle to internal trade" for the reasons stated is a mixed determination of fact and law within the expertise of the Panel and the Appellate Panel finds no reviewable error in the Panel's analysis of this issue.

Articles 404 and 905

139. In Part 5.4.3 of its report33 the Panel deals with its interpretation of articles 404 and 905 of the AIT.

140. The Panel noted that it was the first Panel to consider the provisions of Article 905 and it considered the interpretation of Article 905 and its relationship to Article 404 at some length.

141. The Panel found that: "… where a Party wishes to rely on the legitimate objectives exception to justify a technical measure which would otherwise be inconsistent with the provisions of the AIT, that Party must meet the four (4) elements set out in paragraphs (a) through (d) of Article 404 as such elements are further elaborated upon and supplemented by paragraphs 2 through 4 of Article 905."

142. Further, a Party wishing to avail itself of that exception has the burden of proving that its measure falls within the exception.

143. In support of this proposition, the Panel cites (in footnote 44 of the Panel Report) Annex 1813, Rule 11: "A Party asserting that a measure or proposed measure is subject to an exemption or exception under this Agreement has the burden of establishing that the exemption or exception applies."

144. It is clear that the Panel evaluated the Québec labeling measure against Québec's assertion that this measure met the legitimate objective of consumer protection.

145. The Panel found that "on proper evidence" Québec's labeling measure could be justified as a

[33] Pages 22-25

consumer protection measure for purposes of Article 404(a).

146. However, the Panel found that it was not necessary to determine if there was sufficient evidence to satisfy Article 404(a), because Quebec: "failed to discharge the burdens placed upon it in Article 404(c) and Article 905(2) to show that its measure is not more trade restrictive than necessary to achieve a legitimate objective, and in Article 905(3) to show that its measure does not arbitrarily or unjustifiably discriminate among the Parties, including between the Party and other Parties, where identical or similar conditions prevail."

147. The Panel found that: "[t]he Respondent has offered no apparent scientific, factual or other reasonable basis for the adoption and maintenance of this measure nor has it shown that it has undertaken any effort to ensure a proportionality between the restriction on trade, which is a virtual prohibition, and the risk which would be created by any non-fulfillment of its legitimate objective to protect consumers."

148. The Appeal Panel finds that the Panel's reasoning and conclusions in Part 5.4.3 of its Report are reasonable and within the range of acceptable outcomes and accordingly finds no reviewable error in this part of the Report.

149. The Appellant advances as an alternative ground of appeal that if the Appellate Panel determines that section 4.1 of the FPA is inconsistent with Article 403 of the AIT, it should rule that this measure is still permissible under Article 404 of the AIT.

150. In our view, this is merely an invitation for the Appellate Panel to substitute its views for those of the Panel regarding the application of Article 404 to the facts of this case. Such an exercise would be inconsistent with the Appellate Panel's conclusions regarding the standard of review that applies to this appeal.

Recommendations

151. The Appellant says that the Panel exceeded its jurisdiction by recommending that Québec refrain from enforcing its measures.

152. The Appellant says that the Panel's jurisdiction is limited to reviewing measures for compliance with the AIT and that a recommendation not to enforce legislation is constitutionally inconsistent with the supremacy of Parliament. In addition, the Appellant says that the recommendation must be rescinded because it may be taken into account by a Compliance Panel under Articles 1707 and 1707.1 of the AIT.

153. It must be noted that the Panel is not only authorized to make recommendations but in certain circumstances it is required to do so. Article 1706(3)(d) states that the Panel's Report "shall contain … recommendations, if requested by a Disputing Party, to assist in resolving the

dispute" (emphasis added).

154. In this case, Saskatchewan requested at paragraph 118 of its written submission to the Panel that the Panel make recommendations.

155. The Appellate Panel takes note of the Appellant's argument that it is constitutionally unable to follow the non-enforcement recommendation; but notes also, that Article 1720 of the AIT provides that: "For greater certainty, a Presiding Body has no jurisdiction to rule on any constitutional issue".

156. The jurisdiction of a Compliance Panel is stated in Article 1707 paragraph 9 to be: "to make a determination as to whether the Complaint Recipient has complied with this Agreement in respect of the matters addressed in the Report."

157. We consider that it would be inappropriate for this Appellate Panel to speculate about the possibility of a Compliance Panel being convened or what consideration any Compliance Panel might give to the Panel's recommendations.

158. For the present, it is sufficient to say that we see no merit in the Appellant's position that the Panel lacked jurisdiction to make recommendations and see no basis to interfere with the recommendations made by the Panel.

Panel's Reasons

159. Finally, on several of the grounds of appeal, the Appellant argues that the Panel's reasons are inadequate to explain any aspect of the Panel's conclusions. We do not find any deficiency in this respect.

VIII. Costs

160. Annex 1705 (1), par. 47.3 provides that: "where an appeal is unsuccessful, operational costs shall ordinarily be borne by the Appellant." This rule is subject to the discretion conferred by Annex 1705 (1), par. 47.5 that allows the Appeal Panel to apportion Operational Costs differently based on "other relevant considerations including the procedural conduct of an Appellant or Respondent or the extent of the Appellant's or Respondent's success."

161. In this case, the Appeal Panel does not consider that there are any "relevant considerations" that would justify a variation in the ordinary allocation of costs contemplated by paragraph 47.3. Accordingly, the Operational Costs of the Appeal shall be borne by the Appellant.

162. The Respondent has indicated that it will not be seeking Tariff Costs in the event that it is

successful on the appeal. Accordingly, we make no comment on entitlement to Tariff Costs and no Tariff Costs are awarded.

IX. Summary of Disposition

163. In accordance with Article 1706.1(4) of the AIT, the Appellate Panel:

a. Confirms the Panel Report;
b. Awards Operational Costs against the Appellant;
c. Makes no award of Tariff Costs.

Michael F Donovan QC (Chair)

Sandra MacPherson-Duncan QC

Ronald Perozzo QC